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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	MM Docket No. 99-[illegible]
	)	
Creation of a Low Power Radio Service	)	RM-9208
	)	RM-9242
	)	

COMMENTS OF DELMARVA BROADCASTING COMPANY

DELMARVA BROADCASTING COMPANY

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SUMMARY

Delmarva appreciates the need for diversity in broadcast programming and ownership. In fact, Delmarva, which owns 9 radio stations in Delaware and Maryland, airs a wide variety of ethnic -- including Haitian and Jamaican, as well as other Caribbean and Hispanic --programming.

But Delmarva cannot support the *Notice*'s LPFM proposal, which will cause objectionable interference to and overcongestion of the FM band. The Commission has a fundamental obligation to safeguard radio spectrum from inefficient interference. It must not adopt a proposal that would risk substantial harm to the quality of FM transmissions, especially as such transmissions already have difficulty matching the clarity of those of radio's digital competitors. Neither should the Commission reduce an existing radio station's ability to adapt to unavoidable circumstances -- such as the loss of a transmitter site -- because of the uncertain possibility that additional LPFM stations may marginally increase programming and ownership diversity. Accordingly, the Commission should deny any LPFM proposal.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	MM Docket No. 99-25
Creation of a Low Power Radio Service	)	RM-9208 RM-9242

To: The Commission

COMMENTS OF DELMARVA BROADCASTING COMPANY

Delmarva Broadcasting Company ("Delmarva"), pursuant to Section 1.415 of the Commission's Rules, respectfully submits these comments in response to the *Notice of Proposed Rulemaking* in the the above-captioned proceeding, which proposes to createn several new classes of FM radio stations (collectively, "low power FM" or "LPFM"). 1/

Delmarva appreciates the need for diversity in broadcast programming and ownership. In fact, Delmarva, which owns 9 radio stations in Delaware and Maryland, airs a wide variety of ethnic -- including Haitian and Jamaican, as well as other Caribbean and Hispanic --programming. 2/

1/ *Notice of Proposed Rule Making, Creation of a Low Power Radio Service*, MM Docket No. 99-25 (released February 3, 1999) ("*Notice*").

2/ Specifically, Delmarva owns the following stations: WYUS(AM), Milford, Delaware; WAFL(FM), Milford, Delaware; WXJN(FM), Lewes, Delaware; WDEL(AM), Wilmington, Delaware; WSTW(FM), Wilmington, Delaware; WXCY(FM), Havre de Grace, Maryland; WICO(AM), Salisbury, Maryland; WICO-FM, Salisbury, Maryland; and WQJZ(FM), Ocean Pines, Maryland.

But Delmarva cannot support the *Notice*'s LPFM proposal, which will cause objectionable interference to and overcongestion of the FM band. The Commission has a fundamental obligation to safeguard radio spectrum from inefficient interference. It must not adopt a proposal that would risk substantial harm to the quality of FM transmissions, especially as such transmissions already have difficulty matching the clarity of those of radio's digital competitors. Neither should the Commission reduce an existing radio station's ability to adapt to unavoidable circumstances -- such as the loss of a transmitter site -- because of the uncertain possibility that additional LPFM stations may marginally increase programming and ownership diversity. Accordingly, the Commission should deny any LPFM proposal.

I. THE COMMISSION SHOULD REJECT LPFM, WHICH POSES FAR TOO GREAT OF A RISK OF OBJECTIONABLE INTERFERENCE, ESPECIALLY AS OTHER SOLUTIONS WOULD NOT ENDANGER THE FM BAND

The Commission has a "fundamental" responsibility to ensure "the effective and efficient use" of radio spectrum. 3/ Accordingly, Commission precedent has established a clear policy of protecting established stations against the risk of objectionable spectrum congestion. 4/ In a number of proceedings, the Commission has refused to change technical requirements that might result in increased interference to existing or potential radio service. 5/ Indeed, a substantial body of

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3/ *Notice* at ¶ 21 (citing 47 U.S.C. §§ 151, 303(f) & (g)).

4/ *See, e.g.*, 47 C.F.R. §§ 73.207, 73.213 & 73.215.

5/ *See, e.g.*, *Deregulation Order*, 84 FCC 2d at 977-78 (¶ 25) (1981) (refusing to relax technical requirements, lest the nation "see a return to that unregulated period prior to 1927 when chaos rode the air waves").

Commission precedent has refused individual requests for waivers of interference safeguards -- despite promises to provide equivalent interference protection to all affected broadcasters and the extentuating circumstances of many such cases -- except when the public interest benefits of the proposed waiver are certain and "compelling." 6/

Such policy and precedent confirms that any proposal that requires waiver of the Commission's interference safeguards must demonstrate that its implementation would:

- cause only minimal or nonobjectionable interference; and
- convey an overwhelming net benefit to the public interest.

The LPFM proposal does not begin to satisfy this necessarily rigorous standard.

A. Implementation of Any LPFM Proposal Cannot Help But Lead to Increased Interference and Lower Quality FM Service

In the last 20 years, approximately 3,500 stations have been added to the nation's radio dial. In the heavily populated regions of the Atlantic seaboard, and in other well-served areas throughout the country, a significant number of stations already are short-spaced or have reached the very limits of their possible contours. 7/ Every

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6/ Amendment of Section 73.202(b), Table of Assignments, FM Broadcast Stations. (Denver, Colorado), 46 RR 2d 1379 (1980). There, the Commission rejected a short-spaced proposal for a minority-owned radio station in Denver, noting that "to justify a waiver of the Commission's rules on mileage separation requirements, the showing of need must be compelling. . . . While the need for a minority station in Denver is no doubt genuine, it falls short of the justification for waiver of the magnitude of the short-spacing rules involved here." (citations omitted); *see also Quinnipiac College (WQAQ)*, 8 FCC Rcd 6285 (1993) (rejecting pleas of NCE-FM station to ignore spacing requirements despite "anomalous facts" and lack of interference).

7/ For instance, in the four counties that comprise the Salisbury, Maryland BIA radio market, which is only the 152nd-ranked market in the nation, no fewer than 25 FM

addition of a new FM station to such congested airwaves carries the risk of creating substantial interference to existing service -- whether such interference is predicted or not -- as a result of insufficiently-spaced facilities, of terrain, weather, RF or blanketing effects, or of improper or faulty operations.

Now, the *Notice*'s proposal threatens to add thousands of new potential stations to the FM band. 8/ The Commission has noted that it has received more than 13,000 inquires from parties wishing to obtain some type of low power radio license. Even if only 25 percent -- one of every four -- of these parties actually receive such a license, more new radio stations will be added to the FM band in the next two years than had been added to all of full-power radio in the last two decades. Such a deluge of new "low power" FM stations 9/ on channels outside the existing FM Table of Allotments cannot help but reduce the quality of service that FM stations can provide, and, accordingly, diminish the public use of and satisfaction with its local radio stations.

Worse, the means by which the Commission proposes to accommodate many of these new stations is through the elimination of established interference

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stations already fill the airwaves. BIA Research, *1999 Radio Market Report*, at Metro Rank 152 (1999).

8/ *See, e.g.*, *Notice* at Appendix D (suggesting more than one thousand new stations are possible in substantially sized markets alone).

9/ The power of such stations -- at least the proposed 1,000 watt-station -- does not actually distinguish them from many existing "full power stations." For example, in the Salisbury Market, a number of "full power" stations have an operating power of less than 2,000 watts. Delmarva itself owns a station with an operating power of only 3,000 watts. In any event, the LPFM stations proposed in the *Notice* are of sufficient power that the interference they would cause -- both to co- or near-adjacent channel operations and by blanketing or RF effects -- could have significant adverse effects on existing service.

safeguards, including the sweeping waiver of second- and third-adjacent channel protections. As noted, the Commission has, with good reason, uniformly refused to relax interference protections, even in specific and unusual cases, unless the interference clearly would be minimal (or the affected station affirmatively consents to a particular proposal) and the public benefits certain and compelling. Such prudence, especially in light of increasing FM congestion and the likelihood of a digital conversion using on-channel techniques, is vital to radio's present and future.

Yet, the LPFM proposal may eliminate second- and third-adjacent channel safeguards for several new classes of FM stations. Such a decision would contradict the Commission's own precedent and industry experience. Anecdotal evidence of radio operators demonstrate that elimination of adjacent channel safeguards will result in more interference. 10/ Recent studies confirm that elimination of such safeguards for even "low power" stations risks a great deal of interference to existing radio service. Such individual experience and broad-based studies corroborate what should be obvious: the addition of hundreds or thousands of new radio stations will further congest and reduce the quality of FM radio services in the United States at a time when radio's competitors -- such as the Internet and satellite digital radio -- are preparing to provide ever-better audio quality. 11/

10/ *See, e.g.*, Comments of Duey Edward Wright, President, Midwest Communications, Inc. at 3 (noting that a presumably "low power" translator operating on a third-adjacent channel has interfered with a Class C FM station).

11/ That the Internet may not be as ubiquitous or mobile as radio -- *see Notice* at ¶ 12 -- does not mean it cannot provide an outlet for substantial community programming *and* substantial competition to radio. After all, most persons cannot, for a variety of reasons, listen to the radio all day; likewise, the Commission cannot fail to consider the Internet a significant means of communications simply because most persons do not have round-the-clock access to a particular web site. As Chairman

In any event, the burden should not be on broadcasters to demonstrate the risks of the proposed service. Rather, the burden should be on proponents of the new LPFM service to demonstrate how the drop-in of hundreds of LPFM stations, including some in congested urban areas, would not reduce the overall quality of the FM band. No such showing has been made. 12/

Moreover, any proposal to eliminate established interference protections will reduce the ability of existing radio licensees to improve or adapt their service areas. Such loss of flexibility is itself a threat to the present success of radio. Even now, these existing levels of congestion can pose a problem for a station which, for example, has to adapt to a loss of its transmitter site but does not want to deprive audiences within its established service areas. The addition of LPFM stations to such congested airwaves will make it more difficult, if not impossible, for every full power station that loses its transmitter site to obtain an acceptable alternate site. This unavoidable loss of flexibility is alone sufficient reason to postpone or reject any consideration of LPFM stations.

Kennard has recognized, Internet programming is a competitor of, and even tantamount to, broadcasting: "Broadcast.com, and RealNetworks, and Spinner.com aren't just Internet companies, they're also broadcasters. In the coming world of convergence, both Internet companies and broadcasters have the opportunity to capture a huge new market." *See* Chairman William Kennard, Speech to the National Association of Broadcasters (April 20, 1999).

12/ *See, e.g.,* Dissent of Commissioner Harold W. Furchtgott-Roth, *Notice*, at 1(noting that the Commission "made no effort to assess, much less quantify" what effect eliminating interference protections would have on existing radio service). Neither did the *Notice* cite extensive precedent in support of the proposal: only in cases involving an inherently limited class of stations -- such as grandfathered short-spaced stations -- or in circumstances in which the adversely affected station expressly consented to lesser safeguards -- has the Commission waived its critical safeguards against overcongested airwaves. *Cf. Report and Order, Grandfathered Short-Spaced FM Stations,* 12 FCC Rcd 11840, 11849 (¶¶ 27, 29) (1997).

B. LPFM Also Will Reduce the Effectiveness of the Commission

The burden that LPFM will impose on Commission resources is yet another reason that the proposal must be denied. The *Notice* already has admitted the Commission cannot hope to monitor many LPFM stations' public interest programming or operating schedules. 13/ But the Commission cannot choose to abdicate its obligation to protect all of radio from interference. In light of its experience with existing full power and secondary operations, the Commission has no reason to expect that new LPFM operators will have the resources, the expertise, or the interest necessary to cure any interference -- whether caused by terrain, improper operations or other problems -- speedily and voluntarily. Accordingly, the Commission must be prepared to compel elimination of LPFM-induced interference without significant disruption to the public's existing access to radio. It will not be able to resolve such interference promptly unless it has arranged for significantly more enforcement personnel with resources sufficient to respond to new LPFM-induced interference throughout the country. Without such new resources, LPFM undeniably will undermine not only the quality of FM radio, but also the ability of the Commission to assist, guide and monitor all mass media. Each is a sufficient reason to deny the LPFM proposal.

II. EVEN IF LPFM WOULD NOT RISK EXTENSIVE *PREDICTED* INTERFERENCE, THE COMMISSION WOULD BETTER SERVE THE U.S. PUBLIC BY USING OTHER MEANS TO INCREASE DIVERSITY

The *Notice* indicates that its LPFM proposal has two key aims: to increase diversity of ownership and of programming, primarily by providing the

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13/ *See Notice* at ¶¶ 72, 77.

opportunity for local community groups or minority parties to obtain LPFM stations. 14/ In addition to the many technical, legal and practical risks of the proposal, it is far from likely that the proposal will achieve either goal, at least to the extent necessary to justify the risks inherent in the proposal and the costs the proposal would exact from the Commission, existing and future broadcasters, and the U.S. radio public.

For example, the Commission can guarantee neither that any LPFM station would be given to a minority or community group (at least without risk of a court challenge) 15/ nor that such stations, as a group, will provide programming that does not duplicate existing service and that is of interest to at least a measurable fraction of the station's community (at least without risking First Amendment challenge or overturning radio deregulation). 16/ If the Commission is to allow the stations to air advertising, and so be deemed commercial, the risk of not achieving the goalts of the proposal only increases, as the Commission would appear to have to auction such stations under the Communications Act to the highest bidder (after all credits are included), whatever the relative "diversity" merits of the bidding parties. 17/

14/ *See Notice* at ¶ 1.

15/ *See Notice* at ¶ 62.

16 / *Cf. Notice* at ¶ 68 (simply assuming that all LPFM programming will be of interest and value to relevant communities).

17/ Even though LPFM stations did not exist at the time the Telecommunications Act was enacted, they must be subject to the plain language of that Act, just as they are subject to the alien ownership requirements of Section 310(b). *See Notice* at ¶ 63. To read any provision of the Act as only applying to those classes of radio stations that existed at the time the statute was enacted would risk the authority of the Commission with regard to all future technical developments or to communications media -- or even to new stations -- that did not exist in 1996.

A far better approach would be to restore some form of a tax credit exchange program. Such a program, which could be administered by the Commission for a fraction of the cost in resources that would need to be expended on any LPFM proposal, would enable an owner of underperforming or relatively low power station to assign its license to qualified community or other groups, as determined by set criteria, in exchange for a partial tax credit based on the fair market value of the station. An even more useful form of the program would enable the former owner or the federal government to function as a buy-back lender, to whom the new owner could pay annual or monthly payments until a set total price was reached, after which the station would be assigned the new owner and the payments would cease. Of course, such a program would require general comment and improvement, but at least it would be reasonably certain of achieving the desired aims of this proposal *without damaging existing radio service*. As LPFM cannot project any comparable public interest benefit with any degree of certainly *and* will harm existing radio service, LPFM should not be adopted before such a proposal -- or similar proposals -- have even been considered formally by the Commission.

III. IF THE COMMISSION CHOOSES TO IGNORE LPFM'S EXTENSIVE NEGATIVES AND SCANT POSITIVES, IT AT LEAST MUST REQUIRE LPFM TO SATISFY BASIC PUBLIC INTEREST REQUIREMENTS

A. All LPFM Stations Must Fulfill the Public Interest and Regulatory Requirements of Other Radio Stations.

LPFM stations are radio stations. As radio stations, they must be obligated to uphold all the regulatory requirements of other radio stations. Such evenhanded treatment is not merely a matter of fairness, but of sound policy. A station

that may preclude (or displace) a local FM translator must be obligated to carry the same EAS warnings that the translator would have carried. A station that is subject to any sort of ownership requirements must file and maintain an accurate and publicly available ownership report. A station that is intended to be the essence of a local station cannot be allowed to operate without a *local* public inspection file or a *local* main studio. A station that is to serve its public cannot risk that public's environment by being exempted from environmental requirements.

Moreover, as the Commission is well aware, the operation of a radio station is a privilege. Despite suggestions to the contrary, 18/ even a local, low power radio station cannot be said to justify its use of scarce radio spectrum by its mere existence. By requiring such stations to meet the most basic regulatory requirements of any radio station, the Commission confirms that it is not wasting spectrum on stations that do not benefit the public.

In particular, the Commission must provide additional incentive to ensure that LPFM stations uphold the Commission's Rules regarding improper operations. The purpose of LPFM is to supplement existing radio services, not to displace or disrupt existing radio stations; any LPFM station that is operating inconsistent with that purpose must suspend operations immediately until the problem is remedied. Such a hard-and-fast rule would encourage low power stations to operate according to the terms of their authorizations and to act promptly to cure any interference actually caused. Without a

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18/ *See Notice* at ¶ 72 ("We expect the very nature of LP100 and microradio stations will ensure that they serve the public.") In fact, such stations, which require less upfront investment, and may be operated for the private amusement of the station owner, may be less likely to provide any programming of interest to the public, as the station could survive without any significant listenership.

rule of this sort, LPFM interference -- which may be caused by accident, by negligence, or by intentional misoperation -- may continue to diminish local radio quality and diversity for months or years.

B. No "Low Power" FM Station Should Be Able to Exceed 100 Watts

No truly "low power" station should be able to operate with an effective radiated power greater than 100 watts. Of the comments already filed in this proceeding, many pro-LPFM parties implore the Commission not to create low power stations in excess of 100 watts, as such stations would preclude the construction of too many other stations to be consistent with the proposed service's diversity purposes. 19/ To the extent the Commission is committed to some sort of LPFM proposal, Delmarva agrees that 100 watts should be the ceiling for any potential LPFM stations, as such limited power would help to limit at least some interference caused by such stations and would better ensure fulfillment of LPFM's goals.

C. All LPFM Stations Must Be Owned and Operated by Non-Profits

Viewed in its best light, an LPFM station could provide a "town crier," offering intensely local service and updates of interest to the entire community. However, such "pure" community stations may prove unlikely in practice. For instance, local merchants may seek to obtain such LPFM licenses in order to use, subtly or otherwise, the new station to attract more customers. To ensure that LPFM stations do not become simply an advertising arm of a local supermarket or hardware store, the Commission should insist that only non-profit entities can own and operate such

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19/ *See, e.g.*, Comments of John Bowker at 6 (¶ 11); Comments of Texas Department of Transportation at 2-3.

stations. Otherwise, the service that was to be the town crier could deteriorate into becoming the local huckster, to the detriment of radio's reputation and the public. 20/

V. CONCLUSION

LPFM offers no assurance that it will attain the Commission's stated aims of additional programming or ownership diversity. Moreover, the dangers of the proposal to existing radio service, to the digital future of radio, and to the Commission itself provides more than sufficient grounds to reject the proposal.

Accordingly, for all the foregoing reasons, Delmarva asks that the Commission refuse to further consider any LPFM proposal.

Respectfully submitted,

DELMARVA BROADCASTING COMPANY

By: _____
Julian H. Booker
President

August 2, 1999

20/ Of course, such a restriction does not guarantee that LPFM stations would provide quality service. However, it at least would suit the intent of the service: to provide a local voice for a particular community.